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to the Legislative Assembly
of British Columbia

An Investigation of Forest Renewal BC

The Forest Worker Transition Program Tax Information Dispute

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Executive Summary

Forest Renewal BC (FRBC) initiated the Forest Worker Transition Program (FWTP) in September 1996. The objective of the program was to fund services that would enable displaced forest workers to develop the skills necessary to find new jobs. The program provided participants with income and training supports, both of which turned out to be taxable. The Office of the Ombudsman received a significant number of complaints alleging that FRBC either advised participants that funding was not taxable, or failed to properly inform participants of the possible tax implications.

The primary theme underlying this investigation is that people relied on FRBC's advice and instructions in relation to the tax status of funds provided under the program. From the very beginning, FRBC erroneously assumed that both income and training support payments were not taxable. Long after FRBC agreed, in February 1998, that training supports were taxable, it continued to put forward the position that income support should not be taxable.

This investigation has resulted in substantial findings of unfairness against FRBC. The report findings include the following:

- FRBC's position that income support was not or should not be taxable was found to be unsupported, arbitrary and unjust.
- FRBC acted with administrative negligence when it failed to confirm the tax status of funds provided in an appropriate and timely manner and when it failed to ensure that participants were provided with accurate information on the tax issue.

- FRBC's decision to not issue the appropriate tax slips for income support until the end of November 1999 constituted unreasonable delay.

- FRBC based its decision to not comply with Revenue Canada's instructions and the advice of FRBC's accounting firm on irrelevant grounds.

- FRBC failed to take relevant factors into consideration and, therefore, acted unjustly by not considering the possible adverse consequences of FRBC's decision to delay issuing the appropriate tax information slips and instructing participants to report the income support as social assistance.

- FRBC acted with administrative negligence when it failed to exercise proper care and attention to avoid the negative financial impacts of FRBC's actions on participants. FRBC did so by disregarding Revenue Canada's opinion and the advice of the accounting firm with which FRBC had consulted, by issuing the wrong tax information returns to participants and by failing to apprise participants of relevant and important information in relation to how participants were placed at risk by FRBC's course of action.

Considering the information provided by FRBC and the manner in which that information was presented, it was reasonable for participants to reach the conclusion that FWTP funds were not taxable. FRBC acknowledged that a significant number of people would not have put funds aside to cover taxes and would not have done so because of

information provided by FRBC. In our opinion, the negative financial impact and other associated consequences of the applicable tax were foreseeable and would have been largely avoided had FRBC acted reasonably to meet the standard of care that was appropriate in this situation. However, it is our view that FRBC staff acted in good faith in carrying out their assigned duties.

The province subsequently negotiated an agreement with the federal government to pay the provincial share of taxes and the interest on the balance of the tax debt for up to 24 months. While this agreement certainly provides some assistance to participants, it does not adequately address the impact of the unfairness identified in this report.

The report recommends:

1. That FRBC issue a public apology: for making the initial assumption that both income and training supports were not taxable and acting on this assumption without confirmation from Revenue Canada; for the February 25, 1998, decision to act contrary to Revenue Canada's instructions; for unnecessarily delaying the issuance of appropriate T4A slips for reporting the income support payments; and for the manner in which it acted and presented its position, which led people to assume that taxes would not apply.

2. That FRBC pay all taxes, both provincial and federal, levied against participants, including all interest charges.

3. That FRBC take steps to work with the federal government and other provincial agencies to ensure that any financial assistance provided is paid directly by the province to the federal government and to ensure that this assistance itself is not taxed. That FRBC work with appropriate provincial agencies to ensure that any refund of taxes is not seen as income to be deducted from income assistance or Employment Insurance payments. Alternatively, that FRBC work with the appropriate agencies to reach an equally beneficial outcome for participants, such as, for example, future tax credits of equivalent value

Following a review of FRBC's initial written response, meetings were held with FRBC representatives to allow further representations. In the interim, the CEO and the Board of Directors were replaced. Agreement was subsequently reached on the report conclusions. In a letter dated September 11, 2001, Don Wright, Chief Executive Officer, FRBC, acknowledged, "there were many problems associated with the administration of the Forest Worker Transition Program and we support the substantive findings of the Ombudsman's report. We further acknowledge that many participants of this program ended up in difficult financial situations as a result of information provided to them by Forest Renewal BC."

FRBC has also confirmed its agreement with the three recommendations contained in this report and confirmed its commitment to implement these recommendations. We understand that Recommendations 1 and 3 are being referred to Cabinet for consideration and response. We have been advised Treasury Board is recommending to Cabinet implementation of Recommendation 2. It is our intention to publicly report on Cabinet's response.

The Office of the Ombudsman has conducted an investigation into the role of Forest Renewal BC (FRBC) in administering the Forest Worker Transition Program (FWTP). The information provided to program participants by FRBC regarding the tax status of funds received by FWTP participants was the focus of our investigation, which involved more than 100 complaints to our Office.

One outcome of our investigation is this public report, which is issued pursuant to section 31(3) of the *Ombudsman Act*. Section 31(3) reads:

> **31** (3) If the Ombudsman considers it to be in the public interest or in the interest of a person or authority, the Ombudsman may make a special report to the Legislative Assembly or comment publicly about a matter relating generally to the exercise of the Ombudsman's duties under this Act or to a particular case investigated by the Ombudsman.
>
> R.S.B.C.1996

We are of the opinion that it is in the public interest to issue this report. Program participants are entitled to know the outcome of an investigation into issues that had a direct impact on their lives. As well, it is appropriate and important for the general public to be informed of the outcome of an investigation flowing from complaints that called into question the fairness and the quality of service provided to the public. There is clearly an expectation by the public that issues of this nature receive appropriate attention and an expectation that the service provider be held accountable for the delivery of its programs. This report is also provided

in the interest of other agencies involved in administering public services in the hope that it will assist those agencies in ensuring fairness, quality service and accountability. We also hope that this report will serve to emphasize the importance of carefully considering the level of care that is reasonably expected of any agency in providing program information to the public.

1. General Background and Summary

In this section, we will provide general background information on the FWTP. In addition, we will provide a brief discussion of the Forest Worker Employment and Training Program (FWETP), which was a similar program administered by FRBC prior to the FWTP.

Forest Worker Employment and Training Program

In February 1995, in response to job losses in the forest industry and changes in job skill requirements due to timber supply restrictions, changing technology and new demands of the industry, FRBC considered a proposal for a program to address the training and adjustment needs of forest industry workers. With input from labour through IWA Canada and from industry employers, the FWETP was initiated and became operational on August 21, 1995. The overall goal of the FWETP was to keep forest workers employed in the forest industry by identifying new work opportunities and providing training to forest workers.

In 1996 FRBC made a wage support funding initiative available to those employers considering a FWETP proposal. The wages-in-training funding

initiative reimbursed companies for an amount equal to 75% of the wages paid to the participants while in the training program. An alternative arrangement was designed to provide a similar level of assistance to FWETP participants who were receiving Employment Insurance (EI) or who had exhausted their EI benefits. Information obtained by this Office made it clear that these funds were taxable. It was also noted that laid-off or permanently displaced workers receiving EI and taking FWETP training could lose their EI benefits during the training period. This was confirmed when Human Resources Development Canada ruled that workers involved in the FWETP who continued to receive wages from their employers were considered to be not unemployed and would not be entitled to EI.

Forest Worker Transition Program

Although government and private sector initiatives were at the time attempting to increase the overall number of jobs in the industry, FRBC indicated that new technology and mechanization in the forest industry had displaced thousands of workers over the previous two decades and that the trend was expected to continue. FRBC anticipated that 3,000 to 5,000 forest industry workers would be displaced over the next five years due to new technology and mechanization in the forest industry. As well, FRBC expected that the move to more sustainable harvesting practices and the designation of protected areas would reduce the overall fibre supply and threaten jobs. In April 1996, the Board of Directors of FRBC (the Board) began reviewing a proposal for a comprehensive forest workforce transition strategy, which was to be called the FWTP. The objective of the new program was to fund services that would enable these displaced forest workers to develop skills to facilitate re-employment.

The proposal included the provision of up to $20,000 per participant that would complement, not replace, the EI program administered by Human Resources Development Canada. Rather than referring to the support as wages-in-training, as was the case with the FWETP, the support payment made under the FWTP was called "income support." The proposal also indicated that each participant would receive up to $7,000 for training and tuition. As well, it stated that participants eligible for EI could, by balancing EI and FRBC income support, receive income support for the full duration of a two-year diploma program. The proposal indicated that FRBC income support would cost an estimated $65 million over the next five years if 5,000 displaced workers used an average of $13,000 in income supports. The total expenditure for training support over the next five years was estimated to be $20 million assuming that 5,000 program participants would, on average, use $4,000 each.

On September 12, 1996, the Board approved $64.6 million for implementation of the FWTP in the Pacific Region over three years. This figure was based on a total of 3,500 participants being accepted into the program during the first three years. An "eligible program participant" was considered to be any person whose livelihood was derived from employment in the forest industry, which included the areas of harvesting, manufacturing and silviculture. Program delivery began in the Pacific Region in October 1996 with the agreement that IWA Canada would play a significant role in the delivery of the program. Three offices were established to serve the large geographic area of the Pacific Region. The Vancouver office and the Fraser Valley Delivery Unit were located at IWA local offices, and the Vancouver Island Delivery Unit was located in Nanaimo at the Office of the Forest Jobs Commissioner.

By the end of 1996, without announcement of the program and already at 2,000 participants, it was apparent that the FWTP was attracting many more people than expected. In fact, according to a July 22, 1999, memorandum from FRBC to the Tax Policy Branch, Ministry of Finance, 12,228 participants had been deemed eligible for the program as of that date, with 80% of the participants from the Pacific Region and the remainder distributed relatively evenly across the province. The memorandum also indicated that total expenditures for the FWTP from October 1996 to March 2000 were anticipated to be $134 million.

According to a December 3, 1999, chronology of events prepared by members of the IWA, in July 1996 the IWA requested clarification on whether or not the income and training supports would be taxable. The chronology states that on October 16, 1996, the Executive Director of the FWTP advised the Vancouver Centre that the income tax issue had been unequivocally resolved and that neither income support nor tuition were deemed taxable. The IWA chronology goes on to state that the Executive Director of the FWTP provided the Fraser Valley Centre and the Nanaimo Centre with the same information. It further states that staff members of all three centres verbally advised workers individually and at large group presentations that FWTP supports were not taxable. It clarifies that the tax status was a critical issue that was raised at almost every meeting and that all levels of staff ensured that this "good news" was being stressed to all clients.

Near the end of December 1996, program delivery staff were advised that the tax status of income support was in question as the information previously provided was based merely upon the views of a tax accountant without confirmation from Revenue Canada. Of note,

however, is a January 19, 1998, internal briefing note prepared for the Vice President, Communities and Workforce, FRBC, which states: "Under current policy, payment to, or on behalf of workers, has been assumed to be non-taxable. A decision is required on whether or not to change Forest Renewal policy to be consistent with the Revenue Canada interpretation; or to maintain the status quo." We also note that in spite of the fact that program staff were advised in December 1996 that the tax status of income support was in question, FRBC policy, which remained in place for a period of time beyond January 1998, specifically stated that training and tuition funds were not subject to tax.

According to the IWA chronology, on February 5, 1998, FRBC advised the Vancouver Transition Centre of Revenue Canada's position that both income and training supports were taxable. The Director of the Vancouver Centre immediately responded in writing stressing the seriousness of the situation and requesting the implementation of measures to offset the tax consequences suffered by workers who were given false information. The Director stated that FRBC's failure to offset the tax consequences suffered by workers would result in his letter of resignation along with the resignation of other staff members of the Vancouver Transition Centre.

An FRBC e-mail sent on February 5, 1998, to the Vice President, Communities and Workforce, FRBC, states in part "the issue is that no body (sic) has the funds to pay the tax bills they now face." The e-mail further states that FRBC was advised that if it did not provide funds directly to the impacted participants to cover the taxes, "there will be a mass revolt against the program, FRBC and the Government." As well, an internal FRBC e-mail dated February 16, 1998, to the Vice President,

Communities and Workforce, states: "Heads up. In a briefing with the premier Friday, the IWA raised this as one of their top concerns. The premier was alarmed at the worst-case scenario, and his office is asking for a briefing on the status of this situation ASAP."

The information provided on the tax status of FWTP funds remained a critical issue for participants throughout the program. Eventually, participants were advised that all income and training supports were taxable. The information provided to participants, not only during the initial stages but also during subsequent years, became the focus of complaints made to the Office of the Ombudsman. Participants contacted this Office saying that not only were they advised initially that no taxes would apply to program funds, but subsequent information on the tax status of funds was presented in a manner that led them to continue to believe that taxes would not apply. Over a period of several months, from December 22, 1999, to May 10, 2000, our Office had received more than 80 complaints from program participants.

On May 10, 2000, the Office of the Ombudsman announced in a news release that it was investigating FRBC's actions in relation to the Forest Worker Transition Program, specifically with regard to information provided to program participants on the tax status of funding provided under the program. Our news release stated that our preliminary review of correspondence sent to participants from FRBC appeared to indicate that many program participants were notified in writing that taxes might apply to program funding. However, after further discussion with many complainants, we also learned that FRBC staff had apparently verbally advised many program participants that taxes would not apply to program funds and that there was therefore no need to put money aside to cover taxes. Complainants also stated that FRBC staff had provided

instructions on how to report the funds to Revenue Canada and that FRBC had communicated its general position to program participants that the funds were not taxable.

Our investigation flowed from complaints alleging that FRBC either advised participants that funding was not taxable, or failed to properly inform participants of the possible tax implications. Our investigation, summarized later in this report, has resulted in our Office making substantive findings against FRBC. However, it is our view that FRBC staff acted in good faith in carrying out their assigned duties.

2. The Role of the Office of the Ombudsman

The Ombudsman is an independent Officer of the Legislature appointed pursuant to the *Ombudsman Act*. The role of the Office of the Ombudsman is to ensure fairness and accountability in public administration in British Columbia. The Ombudsman has the power to investigate complaints pursuant to s.10 (1) of the *Ombudsman Act*, which reads as follows:

> **10** (1) The Ombudsman, with respect to a matter of administration, on a complaint or on the Ombudsman's own initiative, may investigate
>
> (a) a decision or recommendation made,
>
> (b) an act done or omitted, or
>
> (c) a procedure used
>
> by an authority that aggrieves or may aggrieve a person.
>
> R.S.B.C. 1996

Upon completion of an investigation, the Ombudsman has broad powers to make findings and recommendations. The grounds for making findings are set out in s.23 (1) of the *Ombudsman Act,* which reads as follows:

> **23** (1) If, after completing an investigation, the Ombudsman is of the opinion that
>
> (a) a decision, recommendation, act or omission that was the subject matter of the investigation was
>
> (i) contrary to law,
>
> (ii) unjust, oppressive or improperly discriminatory,
>
> (iii) made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory,
>
> (iv) based wholly or partly on a mistake of law or fact or on irrelevant grounds or consideration,
>
> (v) related to the application of arbitrary, unreasonable or unfair procedures, or
>
> (vi) otherwise wrong,
>
> (b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority
>
> (i) did so for an improper purpose,
>
> (ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or
>
> (iii) was negligent or acted improperly, or
>
> (c) there was unreasonable delay in dealing with the subject matter of the investigation,
>
> the Ombudsman must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsman considers appropriate.
>
> R.S.B.C. 1996

If it appears to the Ombudsman that there may be sufficient grounds for making a finding or recommendation, the Ombudsman, before deciding the matter, will inform the authority of the grounds and provide the authority with the opportunity to respond either orally or in writing. If recommendations are subsequently made, the authority will be required to notify the Ombudsman of the steps taken or proposed to be taken to give effect to the recommendations, or to provide the reasons for not following the recommendations. At this point, the Ombudsman may either modify the recommendations or, if no action is taken that the Ombudsman believes adequate or appropriate, the Ombudsman, after considering any reasons given by the authority, may submit a report to the Lieutenant Governor in Council and, after that, may make a report to the Legislative Assembly respecting the matter. Separate from any report the Ombudsman may submit as a result of an authority failing to take adequate and appropriate action to give effect to recommendations, if the Ombudsman considers it to be in the public interest, the Ombudsman may make a special report to the Legislative Assembly or comment publicly.

The primary theme underlying the complaints investigated by this Office is that participants relied on FRBC's advice and instructions in relation to the tax status of funds provided under the FWTP. In general, people accept that program information provided by a public agency is information they should be able to rely on. This leads to considering the level of care that can reasonably be expected of an agency in providing information that will be relied on by the public. If an agency fails to meet this level of care, it may be negligent.

Negligence in administration is a failure to exercise proper care or attention in the performance of a public duty. It is reasonable to expect an

agency to recognize a situation in which a person with whom it is dealing is dependent on that agency and to exercise sufficient care in the circumstances to avoid damaging or prejudicing the person's position. The exact nature of the duty that the authority owes to the person will depend on the circumstances. As well, although the authority may not consider itself under a duty of care, or may not have previously addressed its mind to the duty, the duty may still exist.

Careful consideration is necessary when a member of the public alleges that there was a failure to apprise the public of relevant and important information held by an agency. In cases where the information held by an agency could reasonably be expected to affect the position of the person with whom it is dealing, it is appropriate to advise the person of the information at a time when the person first needs that information to allow for the person to make an informed assessment of his or her position.

3. The Complaints and the Standards of Fairness Applied

We determined that the allegations made by complainants against FRBC fell into three areas that required investigation. We identified the specific matters of administration and the corresponding standards of fairness that would apply to each area as follows:

1. ***The allegation that FRBC knew, or ought to have known, that funds provided under the FWTP would be subject to tax and that therefore FRBC should not have advised FWTP participants otherwise.***

The Nature of the Unfairness Investigated:

- Unjust - Lack of Consistency
  - Insufficient Evidence

Fairness Standards Applied:

When an authority has adopted a test or policy as a guide to the exercise of discretion, the test or policy should be applied so that similar cases are treated in a similar manner. Otherwise, an authority acts arbitrarily, and an arbitrary decision is an unjust decision. Although there may not be a stated policy guideline, a determining principle may be inferred from an authority's decision in similar cases in the past. An authority's previous decisions may not necessarily be binding on it as precedent. However, it ought to treat similar cases consistently unless there are exceptional circumstances or equity concerns, which would justify treating ostensibly similar cases differently.

In this investigation, an "arbitrary decision" is defined as a decision not supported by sufficient evidence and made without an adequate determining principle and without consideration and regard for the facts and circumstances.

2. ***The allegation that FRBC acted negligently when it failed to confirm, in an appropriate and timely manner, the tax status of funds provided and when it failed to ensure that participants were provided with accurate information on the tax issue.***

The Nature of the Unfairness Investigated:

- Negligent

Fairness Standards Applied:

In the Ombudsman's Public Report No. 19, The Principal Group Investigation, we defined the term "administrative negligence" as describing administrative acts, omissions or decisions of public officials in BC which failed to meet the standard of care that a reasonable person would recognize to be required of him or her. This is a common-sense test and is a standard that was accepted by the provincial government in that investigation. It is the standard we have applied to FRBC in this investigation.

3. ***The allegation that FRBC acted negligently when, after receiving Revenue Canada's September 11, 1997, opinion, it refused to accept the opinion and then failed to issue the appropriate tax slips for income support until near the end of November 1999. That FRBC's decision to refuse to issue the appropriate tax slips not only failed to take into consideration the consequences to participants but was also based on irrelevant grounds and resulted in an unreasonable delay.***

Nature of the Unfairness Investigated:

- Unreasonable Delay
- Unjust – Failure to Consider Relevant Factors
- Irrelevant Grounds or Considerations
- Negligent

Fairness Standards Applied:

Delay is unreasonable whenever service to the public is postponed improperly, unnecessarily or for some irrelevant reason.

A failure to take relevant factors into consideration involves a judgment, expressed or implied, that those factors are not relevant. It is a mistake of judgment and therefore distinguishable from a mistake of fact. Relevant factors may include factual considerations, as well as principles. Failure to consider relevant factors in the reasoning process leading to a decision can lead to an arbitrary decision which is an unjust decision.

Irrelevant grounds or consideration also involves a judgment, expressed or implied, about the relevance of a particular fact, law or principle and results in a decision based on the irrelevant ground or consideration. It is not uncommon for an authority to receive or become aware of irrelevant information in the process leading up to a decision. If the decision is not based on this irrelevant information, then there is no breach of this standard.

An authority acts negligently when it fails to meet the standard of care that a reasonable person would recognize as a requirement in the circumstances.

1. ***The allegation that Forest Renewal BC knew, or ought to have known, that funds provided under the Forest Worker Transition Program would be subject to tax and that therefore Forest Renewal BC should not have advised Forest Worker Transition Program participants otherwise.***

Complainants told us that an earlier FRBC program was similar to, if not the same as, the FWTP, that taxes were deducted at source and that therefore FRBC knew or ought to have known that FWTP funds would be subject to tax. However, FRBC advised that earlier programs, such as the FWETP, which became operational in August 1995, were different because they were employer-based programs. FRBC advised that because there was an employment relationship in these programs, which was not the case with the FWTP, funds were paid through an employer, and it was the employer that deducted taxes on behalf of the workers. FRBC informed us that under the FWTP, funds were provided directly to participants by FRBC, and that because FRBC was not the employer, there was no ability or authority for FRBC to deduct taxes.

In order to determine whether or not there were similarities between the FWETP and the FWTP, we reviewed each program. We also reviewed one of the FWETP contracts administered by the Office of the Forest Jobs Commissioner. We concluded that the FWETP and the FWTP served both employed and unemployed forest workers. As well, we concluded that there was no substantive difference in the funding provided to participants through the FWETP administered by the Office of the Forest

Jobs Commissioner and the FWTP. These conclusions are based on the following information collected during our review of each program.

FWETP

We found that the overall goal of the FWETP was to keep forest workers employed in the forest industry. The program description stated that it did not provide training resources for forest industry workers who decided to exit the industry. The program description also stated that replacement wages for workers receiving training or other employment services would not be paid through the FWETP. As well, it stated that persons directly benefiting from the FWETP must be direct employees of companies in the forest industry. There was no requirement for a means, needs or income test.

A FWETP evaluation report conducted on the first two years of operation was prepared by a consultant under contract to the Ministry of Education, Skills and Training and Forest Renewal BC. Contrary to the program description, the evaluation report states that the FWETP "has served both employed and unemployed forest workers and we understand that the latter are now to be served by the Transition Program and possibly by the Employment Agency." The evaluation report also recommended that, given the range of other FRBC-supported adjustment programs, in particular the Forest Worker Transition Program, the mandate and services of the FWETP would need to be modified to avoid duplication of services. In reviewing the report, we also discovered that FRBC made wages-in-training available under the FWETP in 1996 and designed an

alternative arrangement to make a similar level of assistance available to FWETP participants who were receiving EI or who had exhausted their EI benefits.

The FWETP evaluation report clarified that FWETP projects were provided in response to the following situations:

> Intact Employment Relationship – the affected workers are still employed, but the jobs are considered to be at risk
>
> Laid–Off – changes in the operating environment have reduced the amount of work available and the affected workers have been laid-off either temporarily or seasonally, but they expect to be recalled
>
> Employment Relationship Ended – the workers are on long-term lay-off or have lost their jobs.

As mentioned above, in the course of this investigation, we also reviewed one of the contracted programs provided under the FWETP. This particular contract was initiated on May 21, 1996, between FRBC and the Office of the Forest Jobs Commissioner and was designed to provide a resource package for up to 90 displaced shake and shingle workers. A June 28, 1996, letter from the Office of the Forest Jobs Commissioner to Revenue Canada clarified that the program was provided in response to workers from the Clayoquot region who were on very long lay-off - i.e., a situation where there was no employment relationship. The letter also clarified that the majority of participants were considered to be individual contractors and self-employed. The term of this particular agreement was six weeks, ending on

June 30, 1996. The package included an initial assessment of all participants and further assessments for those interested in leaving the industry, as well as preliminary training for participants wishing to apply for other work opportunities. The package included "wages paid to displaced workers on course." FRBC provided the funding to the Office of the Forest Jobs Commissioner, which made payment of funds directly to the participants. Although there was no employer/employee relationship between the participants and the Office of the Forest Jobs Commissioner, income tax was deducted at source.

FWTP

With respect to the FWTP, a May 31, 1996, discussion paper called "Forest Workforce Transition Strategy: Adjustment Program" proposed an adjustment program to fund services that would enable displaced workers to find new work, to develop skills to become re-employed or to leave the workforce if they choose. The discussion paper recommended the provision of income support to extend and complement, not replace, EI benefits. It also stated that FWTP income support levels would be equivalent to those under EI and would be offered to displaced forest workers in training. It stated that workers whose EI was exhausted would be entitled to benefits based on the EI formula. In June 1996 the Board of Directors of Forest Renewal BC (the Board) passed a resolution to approve the FWTP including the income support and training grant guidelines. A September 12, 1996, briefing note stated that the purpose of the FWTP was to assist unemployed forest workers to obtain new jobs, either within or outside the forest industry. We note that the FWTP did not refer to any employer/employee relationship for funding purposes, and FRBC discontinued using the term "wages-in-training." However, it appears that both the FWETP and the FWTP

provided a similar form of income support to displaced workers in training who were either receiving EI or who had exhausted their EI benefits.

FWETP and FWTP

In the course of our investigation we also had discussions with people who had been involved in both the six-week FWETP program administered by the Forest Jobs Commissioner and the FWTP to determine their perception of the differences in services provided. One person we contacted had participated in both programs in order to develop skills for planning a business, with the goal of self-employment. This person was unemployed while participating in both programs. She confirmed that taxes were deducted from funds provided though the Office of the Forest Jobs Commissioner. From this person's perspective, aside from the content of various classroom-training courses, and the fact that there was some fieldwork, such as tree spacing and stream clearing, under the six-week program, the services provided were very similar.

As indicated above, the program evaluation report on the FWETP confirmed that the FWETP served both employed and unemployed forest workers, and the latter were then served by the FWTP. As well, it would be difficult to determine the nature of any substantive difference in funding provided directly to participants by one government agency (the Office of the Forest Jobs Commissioner) from the funding provided directly to participants by another government agency (FRBC). In fact, aside from calling one type of funding "wages-in-training" and the other "income support," they appear to provide a very similar type of assistance. Therefore, it appeared that there had been a program in the past, very similar to the FWTP, where there was no employment

relationship and yet funds for taxes were deducted at source by a government agency. Certainly FRBC would have been aware of the similarities between the six-week FWETP program and the FWTP and would have known that the taxes were deducted at source for the six-week program.

It is also important to note that although initially there was no reference to the provision of wages-in-training under the FWTP, the provision of wages-in-training is included in the FWTP Interim Policy Guidelines, dated December 1, 1997. The policy states that the wages-in-training option would be used where there was an employment opportunity of at least 20 hours per week and that this would be paid from the participant's income support entitlement. This again indicates that the two programs were similar. Therefore, it appears that both the FWETP and the FWTP allowed for the provision of income support/wages-in-training to participants where there was no employment relationship as well as to participants where there was an employment relationship.

With respect to the tax status of income support provided under the FWTP, we also note a letter dated October 9, 1996, to FRBC from the accounting firm with which FRBC had consulted, which stated the following:

> *Paragraph 56(1)(u) of the* Income Tax Act *of Canada requires that a social assistance payment based upon a means, needs or income test must be included in income. However, paragraph 110 (1)(f) of the Act allows a deduction for any social assistance payment included in income under paragraph 56(1)(u). The effect of these provisions is that no income tax will be owing on a social*

assistance payment but the payment will be considered income which may reduce the recipient's claim for the GST credit, the B.C. Sales Tax refund and other similar income tax credits or deductions affected by income.

We believe that any eligible worker receiving income support payments as outlined above from the Forest Worker Transition Program is receiving those payments as a result of a means, needs or income test and thus such payments would qualify as social assistance payments.

The October 9, 1996, letter clarifies that a "means, needs or income test" is necessary for the income support payments to be considered social assistance. As well, the letter shows that the accounting firm believed that any eligible worker receiving income support payments from the FWTP "is receiving those payments as a result of a means, needs or income test." As the requirement to conduct a means, needs or income test seemed critical, we asked if FRBC was in fact conducting a means, needs or income test prior to providing income support to participants. We found that FRBC was not conducting means, needs or income tests for participants. As well, in reviewing the program eligibility requirements, we found that there was no evidence to indicate that FRBC planned to carry out means, needs or income tests.

In the course of our investigation we also reviewed a November 25, 1996, letter from Revenue Canada to the Forest Jobs Commissioner, who as of October 1, 1996, had been appointed as Executive Director of the FWTP. The letter advised of Revenue Canada's ruling in respect to whether or not participants in the May 1996 to June 1996 six-week program provided

through the Office of the Forest Jobs Commissioner were insurable for the purposes of Employment Insurance and "pensionable" for the purposes of the Canada Pension Plan. Although the ruling was limited to the insurability of funds provided under the six-week program, we believe the ruling was relevant to the FWTP. As previously mentioned, unemployed workers received funding while participating in training under both programs. The ruling confirmed that the relationship between program participants and the Office of the Forest Jobs Commissioner was not an employment relationship but rather a program/participant relationship. The ruling also clarified that although program funds provided through the Office of the Forest Jobs Commissioner were not provided on the basis of any employment relationship, the funds were taxable.

In summary, it would appear that there was no sound reason for FRBC to assume that income provided to unemployed participants under the FWTP would not be taxable when income provided to unemployed persons under the FWETP, including the income provided through the Office of the Forest Jobs Commissioner, was previously considered taxable.

Finding:

FRBC took a position under the FWETP that income support (wages-in-training) was taxable in cases where there was no employment relationship. Under the FWTP, it departed from that position and took the position that income support was not or should not be taxable. FRBC's decision to change its position is unsupported and therefore arbitrary and unjust.

2. ***The allegation that Forest Renewal BC acted negligently when it failed to confirm, in an appropriate and timely manner, the tax status of funds provided and when it failed to ensure that participants were provided with accurate information on the tax issue.***

During the course of our investigation, we reviewed evidence to determine when FRBC became aware of the tax status of its funding and to determine when participants were provided with that information. We concluded that FRBC learned early in the program delivery that there would be tax implications and that inconsistent information was provided to program participants. The following information supports the conclusions.

A fact sheet dated April 19, 2000, and presented to the Office of the Ombudsman on that same date, included the following:

> *On October 9, 1996, Forest Renewal obtains an opinion from [the accounting firm], which indicates that FWTP client support payments, (both training and income support) are not taxable. This opinion was immediately forwarded to Revenue Canada for confirmation… On September 11, 1997, almost one year after the initial request, Revenue Canada stated that both training dollars and income support payments were taxable. However, [the accounting firm] did not verbally advise FRBC that it had received Revenue Canada's opinion until mid-December 1997. This was then followed up with a written opinion on January 5, 1998. As soon as FRBC became aware of the [Revenue Canada] opinion it conveys that information to staff and contract delivery agents to provide to clients.*

We also note that in a May 15, 2000, letter to a representative of some program participants, FRBC states that it had taken steps to keep clients up to date with the same information it had on the tax status of income support payments and to warn clients there may be a future tax liability.

We reviewed FRBC file documents to determine what steps FRBC had taken to clarify the tax status of FWTP funds and when those steps were taken. Based on the information presented to this Office, it would appear that neither senior FRBC officials nor the Board questioned or raised the tax issue during the program design phase or when the Board approved the program. From the minutes of an October 4, 1996, meeting between FRBC and the Office of the Forests Jobs Commissioner, however, it would appear that there was a concern about possible tax implications depending on how FRBC characterized the participants. We note that a statement was made that "In regards to Revenue Canada's view of FRBC's relationship to the participants of the program, they will be considered 'other' rather than contractors or employees." We also note that with respect to income support, the Interim Policy Guidelines stated "Forest Renewal will issue a T4A to the client at the end of the taxation year." It would appear that there was some expectation that taxes would apply to income support, as T4A information returns are required for reporting amounts taxable as scholarships, fellowships or bursaries.

In any event, based on the information obtained by this Office, we have determined that FRBC did not contact Revenue Canada directly at any time during the program design phase to obtain advice or an advance ruling. The only record of any attempt by FRBC to follow up on the tax issue was after the September 11, 1997, Revenue Canada opinion, and

this occurred on October 29, 1997, when FRBC Finance and Administration, Victoria, contacted the accounting firm. This is the same day that the accounting firm faxed Revenue Canada's September 11, 1997, opinion to FRBC Finance and Administration. It is also the same day that Finance and Administration stated in an internal e-mail: "it doesn't look like we can avoid issuing T4As."

In the course of our investigation, we interviewed staff of Canada Customs and Revenue Agency (CCRA), formerly Revenue Canada, to discuss whether or not the September 11, 1997, response to the accounting firm's request was a typical response time. We note that the letter from the accounting firm to Revenue Canada was dated October 30, 1996, and was received by the Income Tax Rulings and Interpretation Director in Ottawa on November 20, 1996. Revenue Canada advised that in order to complete its review, additional program information was required. We were advised that on several occasions, Revenue Canada attempted to obtain this information, as well as to obtain authorization from FRBC to discuss the issue with the accounting firm. The required information was eventually sent on July 15, 1997, and this included FRBC's letter of authorization for Revenue Canada to discuss the FWTP with the accounting firm. Once all the information was received, Revenue Canada responded within two months (July 1997 to September 1997).

Regardless of the actions or inactions of any other agency involved, FRBC was ultimately responsible for either obtaining an advance ruling from Revenue Canada, which would have been the most appropriate course of action to follow, or at least ensuring that Revenue Canada had received all of the information required to issue an opinion. Unfortunately, FRBC was not proactive either in obtaining an advance ruling or in

following up on this issue to ensure that Revenue Canada received the required information in a timely manner. In light of the fact that FRBC was well aware that the issue was of critical importance to participants, it is reasonable to expect that FRBC would have done more to encourage and facilitate timely clarification on the tax status of funds provided under the program.

A January 19, 1998, FRBC briefing note from the Coordinator, Adjustment Programs, to the Vice President, Communities and Workforce, FRBC, states that, given that a ruling from Revenue Canada was not expected for a matter of months after the request was made, FRBC went on to develop policy stating that training support was not taxable and that income support may be taxable. The briefing note also states, however, that "Under current policy, payment to, or on behalf of workers, has been assumed to be non-taxable." It also confirms that tax implications had not been analyzed when program policy was developed. As well, it confirms that the issues of EI as opposed to non-EI-eligible workers or workers pursuing self-employment as opposed to training were not specifically addressed.

We note that the accounting firm's October 9, 1996, letter included the comment that "these are our views only. I suggest that we approach Revenue Canada, Taxation on a more formal basis to ensure they agree with our comments." The letter stated that income support payments received as a result of a means, needs or income test would qualify as social assistance. It also stated that the scenario is different for those receiving income benefits under the Employment Insurance Program. It states that in these cases, "the training grant will, we believe no longer be considered to be a social assistance payment because it does not meet

the means, needs or income test." It goes on to say that such a grant will instead be considered as taxable under paragraph 56(1)(n) as a scholarship, fellowship or bursary.

There does not appear to be any reasonable explanation as to why FRBC failed to address the different tax status scenarios identified in the accounting firm's October 9, 1996, letter. FRBC's own policy and planning documents advised: "Income Support would complement, not replace, the Employment Insurance program administered by HRDC." Clearly, the tax scenarios applicable to EI as opposed to non-EI eligible workers were very relevant factors to consider. It is also unreasonable that FRBC policy incorrectly stated that training support was not taxable. By failing to develop accurate and comprehensive policy at the initial stages of the program, FRBC was unable to properly inform those people who were considering participating in the program. Unfortunately, this prevented people from making informed decisions.

Participants said that when they entered the program and completed their Training and Income Support Projections, prior to signing the agreement with the FWTP Career Coordinator, the Career Coordinator advised that the funds were not taxable. Complainants said that they viewed this as a verbal commitment/contract that they believed they could rely on. They pointed out that FRBC staff reinforced this verbal agreement in February 1998 and January 1999 when FRBC sent T5007 slips along with letters advising that participants report income support as social assistance.

A review of FRBC documents confirms that in late 1996 and early 1997, people received inaccurate and confusing information, including advice that both training and income support funds were not taxable. For

example, the FWTP Director of the Vancouver Transition Centre stated in a February 5, 1998, fax that based on information provided by FRBC, program staff had at one time been advising workers that income support was not taxable income. The Director goes on to state that along with program staff, he had personally made presentations to groups of workers "stressing the non-taxability of income support." He goes on to state: "we have to date also been advising that tuition/training dollars are not taxable." As well, numerous FRBC 1997 meeting notes show that staff members received a variety of instructions, which included being advised to assume that client benefits were not taxable.

Further, an FRBC e-mail dated February 24, 1998, from the Manager, Adjustment Programs, to another manager in Workforce Renewal states: "Its (sic) pretty clear that there has been considerable inconsistency about information related to applicants and clients, and selective hearing and interpretation and implementation of 'directions' from the program management on the part of the program delivery managers." Also, a July 6, 1998, FRBC briefing note states that initially, due to a combination of inaccurate information, inconsistent direction to delivery agencies and staff, and staggered program start-up dates, clients entering the FWTP in 1996 and early 1997 were told a mixture of things about whether or not training and/or income support provided under the program were taxable. During the first few months in 1997, well before FRBC received Revenue Canada's opinion, concerns were raised about the inaccuracy of advice being provided to participants. FRBC was concerned at this time that both income support and training support could be subject to taxes. In fact, options were already being considered and discussed for covering taxes that would be payable by the participants.

In response to this Office's request for evidence of any steps taken by FRBC to ensure that accurate information was being provided on the tax issue, FRBC provided notes to show that on a few occasions, some staff members were advised to inform displaced workers that the tax issue was not resolved. However, there is no evidence of FRBC monitoring to ensure that those people who were already in the program were contacted and appropriately advised that previous information was inaccurate. In fact, there is no evidence to indicate that those participants received any information prior to the end of February 1998, when they were advised that training support funds were subject to tax but that income support should be reported as social assistance and not subject to tax. As well, it is unfortunate that no process was initiated by FRBC to allow it to track the nature of the information that was subsequently provided to new participants.

With respect to the accuracy of information provided, contrary to statements made by FRBC to this Office and to the public, FRBC was not only verbally advised of Revenue Canada's opinion prior to mid-December 1997, but FRBC also received a copy of Revenue Canada's opinion on October 29, 1997. As well, we were unable to find support for the statement that as soon as FRBC became aware of Revenue Canada's opinion, it conveyed that information to staff and contract delivery agents to provide to clients. We note that as stated in a December 9, 1999, FRBC briefing note prepared by the Policy Manager, Workforce Programs, FRBC maintains "Forest Renewal advised clients and contracted delivery agents of Revenue Canada's opinion when it was received in 1997." However, clients were not advised of this in 1997 and, even after receiving Revenue Canada's September 11, 1997, opinion,

FRBC continued to advise its delivery staff that it had not received Revenue Canada's opinion and instructed staff to pass this information on to program participants.

As well, a Financial Department memorandum dated December 18, 1997, from the Manager, Finance Department, Vancouver Island Delivery Unit, states: "We are doing some preliminary work on the T4A requirements, pending Revenue Canada's ruling. I don't feel we will need additional staff over and above the contingency staff recently approved." Again, FRBC regional staff continue to be of the opinion that FRBC had not yet received Revenue Canada's opinion. Of note, however, is that the Vancouver Island Delivery Unit was already working on the T4A requirements, which would appear to be consistent with Finance and Administration's October 29, 1997, comment that "it doesn't look like we can avoid issuing the T4As."

Also, on January 5, 1998, the same accounting firm that FRBC had consulted with previously gave an opinion that training and income supports were taxable and recommended that FRBC provide T4A tax slips for all FWTP payments as instructed by Revenue Canada. However, this information was not shared with any participants. We also found that the content of letters sent to participants once they were deemed eligible for the FWTP clearly demonstrated an inconsistency between advising new participants that income support funds were in fact taxable while at the same time communicating to existing participants that FRBC was of the opinion that income support was social assistance, should not be taxed, and should be reported as social assistance. The information also confirmed that FRBC not only provided inaccurate information on the tax status of funds to participants at the beginning of the FWTP in 1996 and

1997, but that FRBC continued to provide inaccurate and conflicting information in 1997, 1998 and 1999.

Finding:

That FRBC acted with administrative negligence when it failed to confirm the tax status of funds provided in an appropriate and timely manner and when it failed to ensure that participants were provided with accurate information on the tax issue.

3. ***The allegation that Forest Renewal BC acted negligently when, after receiving Revenue Canada's September 11, 1997, opinion, it refused to accept the opinion and then failed to issue the appropriate tax slips for income support until near the end of November 1999. That Forest Renewal BC's decision to refuse to issue the appropriate tax slips not only failed to take into consideration the consequences to participants but was also based on irrelevant grounds and resulted in unreasonable delay.***

This area of our investigation focused on determining the basis of FRBC's failure to issue appropriate T4As for income support until near the end of November 1999 despite having received Revenue Canada's opinion on September 11, 1997. This involved a review of the information that FRBC provided to support its decision to not comply with Revenue Canada's instructions.

FRBC stated that "Forest Renewal BC always relied on the advice of our accountants and tax lawyers on this issue, and this advice was conveyed to clients." However, as already noted, FRBC did not follow the January 5, 1998, advice of the accounting firm, which recommended that FRBC follow the instructions of Revenue Canada and issue T4As for income support payments. Nor did FRBC communicate this advice to participants at the time.

In February 1998, FRBC had prepared the proper tax slips and letters to be sent to participants. The correct information was ready to be mailed just prior to the end of February 1998, which was the deadline for filing T4As. Correspondence dated February 16, 1998, not only confirms that FRBC was preparing T4A slips for all client support recipients for 1996 and 1997, with letters explaining the fact that the client support payments were taxable, but also advises that FRBC would start deducting, at source, and remitting income tax on all future client support payments, "if the client so instructs us." However, on February 25, 1998, FRBC decided to instead issue T5007s for the income support payments to all clients who received support in 1996 and 1997. On February 28, 1998, the T5007s were sent to participants with instructions to report the income support as social assistance, which is not taxable. The letter to participants included the statement that "...Forest Renewal is challenging Revenue Canada's decision to tax the income support you have received."

FRBC stated that the reason for not complying with Revenue Canada's instructions or with the January 5, 1998, advice of the accounting firm, was because: "Fundamentally we disagreed with a finding which in essence read 'tax the unemployed,' while they are making best efforts to

retrain and become productive." We note, however, that FRBC was well aware that income provided to unemployed participants under the FWETP was taxed. As well, FRBC was well aware that EI itself, which provides income support to unemployed workers, is taxable, and that the income support under the FWTP was intended to be complementary and in addition to EI and at the same levels.

As well, in January 1998, FRBC approached the Ministry of Education, Skills and Training to see if that ministry was aware of any arrangement that the province had with the federal government regarding provincial training and employment programs where the payment of training costs and/or income supports were not taxable. At that time, the Ministry of Education, Skills and Training confirmed for FRBC that there was no such arrangement and that all income support and training support payments made to or on behalf of clients are taxable in the hands of the clients. As such, the decision to take exception to the idea of unemployed workers having to pay tax on income received, and therefore not comply with Revenue Canada, does not appear to be supported by sufficient evidence. In addition, whether or not unemployed workers are taxed is not FRBC's decision to make. FRBC acknowledges in its February 28, 1998, and January 27, 1999, letters to participants that "Forest Renewal staff and our agents delivering the Forest Worker Transition Program are not qualified to answer questions regarding income tax." As well, in other correspondence FRBC acknowledges: "At the end of the day, Revenue Canada has the legislative authority to determine taxes owing by individuals ..."

On February 25, 1998, FRBC received a letter from its law firm enclosing a copy of Revenue Canada's informal opinion regarding the Saskatchewan Provincial Training Allowance. It showed two components to the client support, namely, the social assistance portion and the bursary portion. We also note that the lawyer for the law firm states in this letter: "I believe that is the way that it should be reported in the information slips which will be given to your clients at the end of this month."

What is not clear from the information provided by FRBC is why FRBC took the position to challenge Revenue Canada. Aside from the law firm's February 25, 1998, letter, which does not comment specifically on whether or not FRBC was actually providing social assistance based on a means, needs or income test, or comment on the likelihood of FRBC successfully challenging Revenue Canada, at this point there does not appear to be any supporting documentation to lead FRBC to the decision to challenge Revenue Canada. In fact, FRBC's own opinion at the time, as indicated in a briefing note prepared for the Vice President, Communities and Workforce, FRBC, was that "It is unlikely that Forest Renewal will be able to successfully challenge Revenue Canada's interpretation, and moving now will mitigate somewhat the consequences of the interpretation on program clients and the Corporation." We also note that at the time FRBC decided to challenge Revenue Canada, it would appear that it had not received advice as to whether or not it had legal standing to do so. The merits of a formal legal challenge of Revenue Canada's position were subsequently commented on in a July 28, 1998, opinion provided by the law firm.

As discussed previously, the October 9, 1996, letter from the accounting firm stated that a "means, needs or income test" is necessary for income support payments to be considered social assistance. A review of the British Columbia Auditor General's Workforce Activity Area Report provided this Office with additional evidence as to FRBC's position on whether or not it was conducting means, needs or income tests. In 1997, at the request of FRBC, the Office of the Auditor General undertook a review to assess the process for administering contribution agreements in various programs under the workforce activity area, in particular to make recommendations for improving the process. The scope of the review covered contributions of public funds under several FRBC programs, including the FWTP. On page 46 of the report, under "Establishing and Operating Programs" and "Determining Stakeholders Contributions," the following comments are made:

> *A final problem we noted in this area is that the Corporation is not assessing the financial needs of individuals before funding them. In the Forest Worker Transition Program, the only requirement for funding is that the individual be an unemployed forest worker. Once an individual is assessed as eligible to receive training, his or her financial status is not taken into account.*

One of the recommendations made in the Auditor General's report is that FRBC place greater emphasis during the appraisal process on the valuation of the financial need of the organization or the individual being funded. FRBC's June 1997 response to the recommendation includes the following comment:

Although a needs or means test approach is one model for determining whether to support the transition costs faced by displaced workers, Forest Renewal chose to accept workers into the Transition Program based on whether they had long term and primary attachment to the forest industry. Re-employment plans were developed and supported based on the needs of individuals - not on their financial status.

Based on a review of FRBC's response to the Workforce Activity Area Report, we can conclude that FRBC's own statement in June 1997, several months before Revenue Canada's September 11, 1997, letter, is evidence that FRBC was well aware that it was not conducting the required means, needs or income tests. Although it seems reasonable to assume at this point that FRBC must have also known that income support payments would not be considered equivalent to social assistance, and therefore would be subject to tax, we continued to investigate the basis of FRBC's refusal to issue the proper T4As.

Further review of the evidence shows that following FRBC's February 25, 1998, decision to not comply with Revenue Canada's instructions or the recommendation of the accounting firm to issue the T4As, FRBC received a legal opinion from its law firm. The February 26, 1998, opinion confirms that the law firm had reviewed the FWTP Interim Policy Guidelines. The opinion includes the statement that in order to fall within the definition of "social assistance," payments must be made on the basis of a "means, needs or income test." It goes on to state that "we are unable to provide you with a firm opinion as to whether the income support payments made under the Program constitute 'social assistance' for the purposes of paragraph, 56(1)(u) of the Act." However, it also provides a number of arguments that FRBC could make in support of

taking the position that income support payments constitute "social assistance" for the purposes of the Act. It goes on to state: "...it is our view that Forest Renewal BC would not be acting unreasonable (sic) in issuing T5007 slips to the recipients of such payments."

A March 12, 1998, note to file regarding the strategy of FRBC's possible challenge of Revenue Canada's position acknowledges that if a client has received income from other sources, then the combined amount may exceed a level that would allow the income support to be justifiably called social assistance. It goes on to list several factors which could put the issue of the income support being accepted as social assistance at risk, including the inconsistent application of the eligibility criteria (letting in clients who really shouldn't be part of the program), the use of income support to top-up a client's EI (a source of taxable "other" income), and the provision of income support concurrent with severance payments (another source of taxable "other" income).

As well, a May 4, 1998, Forest Renewal BC briefing note prepared for the Vice President, Communities and Workforce, FRBC, as well as for the Chair and Chief Executive Officer, states: "The claim that income support is equal to social assistance may be hard to sell due to the lack of the usual type of means test or needs test used to support social assistance." It goes on to state:

> *In practice, the FWTP has not been viewed as a social assistance program - it is a back-to-work program that provides services and financial support to assist workers, and doesn't look at the financial needs of workers other than automatically providing full income support if the client is participating in full-time training.*

A July 6, 1998, Forest Renewal BC briefing note prepared for the Vice President, Communities and Workforce, FRBC, states that FRBC could only challenge Revenue Canada's interpretation if each participant who wants to appeal their income tax assessment signs and files a 'Notice of Objection' with Revenue Canada and appoints FRBC and its counsel as their representatives. It goes on to state: "Otherwise, Forest Renewal has no legal position with respect to the income tax issue." It also states that in any event, the likelihood of successfully challenging the interpretation does not appear high. As well, it shows that its law firm advised that Revenue Canada's Appeals Division is unlikely to reverse the existing interpretation.

In a July 28, 1998, letter to FRBC, the law firm states: "In order to succeed in challenging Revenue Canada's position on this issue, we indicated that FRBC would have to establish that income support payments were made on the basis of a 'needs or income test'." The July 28, 1998, letter confirms that in prior discussions with FRBC staff, the law firm advised that Revenue Canada's position is consistent with Revenue Canada's stated administrative position in earlier technical interpretations, that it is unlikely that Revenue Canada would alter its position unless forced to do so as a result of a court decision and that, as such, FRBC would not be successful in challenging at the Appeals Division level. It goes on to state that in discussions subsequent to the law firm's February 26, 1998, letter, the Manager, Adjustment Programs, FRBC, advised that:

> *In practice, FRBC has not been applying a "needs or income test" in determining client entitlement to income support. Rather, the award of income support has, more or less, been automatic for Program participants. As a result, full income support payments have been*

made to Program participants who would not, under any objective standard, be considered to be in need of such income support (i.e. Program participants who have received significant lump sum severance payments from their former employers.)

In practice, FRBC has applied income support payments towards the payment of various training related expenses without distinguishing such payments as "bursaries" for income tax purposes.

The July 28, 1998, letter from the law firm goes on to confirm that, relying on the facts above, the likelihood of FRBC succeeding in a court challenge of Revenue Canada's administrative position with respect to the income support payments is small. It also stresses the point that the decision whether or not to appeal is really a decision to be made by the program participants and not by FRBC. Under the section of the letter titled "urgent and important" the law firm advised that should FRBC decide not to pursue a legal challenge of Revenue Canada's position in respect of the income support payments, it would be prudent for FRBC to immediately notify those program participants who had contacted FRBC that FRBC will not be handling the appeal on their behalf.

With respect to the law firm's comment that subsequent to the February 26, 1998, letter, FRBC advised that it was not applying a needs or income test, notes of a February 24, 1998, telephone discussion between FRBC and the law firm show that "the means, needs or income of the individual" was discussed. It is unfortunate that FRBC did not specifically advise the law firm, prior to the law firm's February 26, 1998, opinion, that FRBC was not applying a means, needs or income test.

To the surprise of this Office, we then found that contrary to the accumulating evidence against income support being considered as social assistance, on January 27, 1999, FRBC again issued T5007s to participants who received income support payments in 1998 along with instructions to report the income support as social assistance. Even though FRBC was continuing to present the position to participants who had previously received income support that FRBC strongly believed it was equivalent to social assistance, at the same time new participants were being advised in acceptance letters that "all income support and training is taxable." We note that while the January 27, 1999, letter advises participants that "Revenue Canada has ruled that, in their opinion, both the training support and income support you received under the Forest Worker Transition Program are taxable," there is no longer a statement made that FRBC believes income support to be social assistance. As well, there is no mention of FRBC challenging Revenue Canada. Rather, it simply advises that participants should report the income support as social assistance and warns that Revenue Canada may reject the claim that income support is social assistance. The letter goes on to advise that if further information is required regarding filing tax returns, participants should contact Revenue Canada or seek professional tax advice as FRBC is not qualified to answer questions regarding income tax.

We also note that again in a July 2, 1999, letter, the law firm clarifies that it has difficulty stating that amounts are included in income under paragraph 56(1)(u) of the *Income Tax Act*. It reiterates that the critical words in that paragraph require that the payment be made on the basis of a "means, needs or income test." It also states that:

Any additional indication by Forest Renewal BC that it does not consider the income support payments to be social assistance payments for the purpose of paragraph 56(1)(u), will foreclose any possibility of a settlement with Revenue Canada. Revenue Canada will consider these indications, including the issuance of T4A's to current or past participants, as an admission that the amounts were not social assistance payments. Thus I suggest that Forest Renewal BC not issue T4A's at this time.

A letter dated August 23, 1999, from Revenue Canada to FRBC shows that FRBC was considering paying the income taxes owed by participants as a result of the incorrect information slips being issued. It clarifies that Revenue Canada was prepared to accept a proposal of this nature based on a couple of conditions, including FRBC's undertaking to issue proper information slips in the future. A September 10, 1999, briefing note states that Revenue Canada has advised FRBC that the outstanding taxes and interest on FWTP income support payments made in 1996, 1997 and 1998 are estimated at $10.97M and that Revenue Canada was attempting to determine if FRBC would be paying this sum on the clients' behalf. The briefing note also indicates that the interest potentially to be paid by clients was accumulating as time passed. On October 8, 1999, the Chair and Chief Executive Officer, FRBC, sent a letter thanking Revenue Canada for its patience in waiting for FRBC's response and states: "Forest Renewal BC has decided not to make any payments to Revenue Canada on behalf of payment recipients."

On November 4, 1999, Revenue Canada wrote to FRBC advising that Section 221 and Regulation 200 of the *Income Tax Act* requires that information returns in prescribed form be made in respect of these payments. It states that the T5007 forms do not meet these legislated

requirements and that Revenue Canada understands that FRBC has agreed to issue the proper T4As. It goes on to state that FRBC will not be subject to any non-compliance penalty if these information returns are prepared in a timely manner. On November 24, 1999, FRBC started issuing the appropriate T4A slips showing income support as being taxable. In mid-December 1999 program participants started receiving tax-reassessment notices advising of the tax liability.

This Office has considered whether or not FRBC's decision to delay issuing the proper T4As until the end of November 1999 was unreasonable. In the opinion of this Office, delay is unreasonable whenever service to the public is postponed improperly, unnecessarily or for some irrelevant reason. Program participants, who were ultimately responsible for paying the tax liability and who were the only ones legally able to file a notice of objection with Revenue Canada, were entitled to receive the proper T4As as soon as possible. There was a duty of care to provide the proper tax slips to participants in a timely manner, and it is reasonable to assume that FRBC should have recognized this duty.

It appears that FRBC delayed the issuance of the T4As even though it knew that income support would not qualify as social assistance. Apparently, this decision was made to avoid indicating in any way to Revenue Canada that FRBC did not consider the income support payments to be social assistance, as this would "foreclose any possibility of a settlement with Revenue Canada." Unfortunately, this approach led people to believe and/or hope that tax would not apply. They continued with their lives without putting aside any money to cover taxes, as they had been instructed by FRBC in February 1998 and January 1999 to report income support as social assistance. People also questioned why

FRBC never withheld taxes from support payments, as this would have alleviated the eventual tax burden. In response, FRBC explained:

> *Forest Renewal is under no legal obligation to deduct and remit taxes from client payments. If we had done so voluntarily, we would have, in effect, implied that income support monies were taxable, and this would have undermined the argument we had put forward to Revenue Canada on behalf of our program clients.*

We also note that while FRBC would have been able to assist participants, at their request, by deducting and remitting taxes if the proper T4As had been issued, when T5007s were used to report the income, there was no longer a mechanism in place for Revenue Canada to accept remittances on behalf of program participants.

As we know, when FRBC failed to issue the proper tax slips to program participants, or to deduct taxes, it resulted in Revenue Canada not being privy to information indicating that the income support was not social assistance. This resulted in an inability to settle with Revenue Canada and led to further unnecessary delay in reaching the inevitable outcome that income support was subject to tax. It would appear that FRBC failed to consider the possible consequences for program participants of FRBC's decision to reject Revenue Canada's opinion and the advice of FRBC's tax expert, and also the possible consequences of not issuing the appropriate tax slips for income support until late November 1999. As well, FRBC never advised participants that they were at risk with FRBC's course of action. Although it was evident that participants were depending on FRBC, FRBC failed to exercise sufficient care to avoid the negative financial impact on participants.

Findings:

- That, after receiving Revenue Canada's September 11, 1997, opinion, FRBC's decision to not issue the appropriate tax slips for income support until the end of November 1999 constituted unreasonable delay.

- That FRBC based its February 25, 1998, decision to not comply with Revenue Canada's instructions and the advice of FRBC's accounting firm on irrelevant grounds. FRBC's fundamental disagreement with unemployed persons having to pay tax is irrelevant and in no way supports its decision to not comply with a federal agency that has the expertise, authority and responsibility for making determinations as to what types of income are taxable

- That FRBC failed to take relevant factors into consideration and, therefore, acted unjustly by not considering the possible adverse consequences of FRBC's decision to delay issuing the appropriate tax information slips to participants, instructing participants to report the income support as social assistance, and deciding to not deduct taxes because FRBC considered that this would have undermined its argument that income support was social assistance.

- That FRBC acted with administrative negligence when it failed to exercise proper care and attention to avoid the negative financial impacts of FRBC's actions on participants. FRBC did so by disregarding Revenue Canada's opinion and the advice of the accounting firm with which FRBC had consulted, by issuing the wrong tax information returns to participants and by failing to apprise participants of relevant and important information in relation to how participants were placed at risk by FRBC's course of action.

In reaching our findings, the Office of the Ombudsman has considered:

- FRBC's shifts in position regarding the tax status of training and income supports;
- FRBC's actions regarding the FWTP from October 1996 to November 1999;
- FRBC's early statements that training and income supports were not taxable and FRBC's failure to appropriately deal with inaccurate information regarding the tax status of such supports;
- FRBC's advice to participants to report the income support as social assistance while at the same time advising that FRBC would challenge/dispute Revenue Canada;
- FRBC's inaccurate advice to staff, contract delivery agents, and program participants;
- FRBC's delay in issuing appropriate tax forms until November 1999; and
- the manner in which FRBC presented its position and provided instructions to participants, which led participants to believe that the funds were not taxable.

Our Office's consideration of all the information provided to participants by FRBC, as well as the manner in which that information was presented, has resulted in this Office determining that it was reasonable for participants to reach the conclusion that FWTP funds were not taxable.

During a meeting with the Office of the Ombudsman on April 19, 2000, FRBC staff stated that while they agreed there was a range of advice

provided to people, FRBC believed it gave the best advice that it could give and the best advice that was available given its goal of ensuring that participants received the most benefit from the program. We were also advised that in light of the agreement-in-principle negotiated between the province and the federal government, all participants would be better off than they would have been had they not participated in the program. We were told that this was because participants not only received several years of free money but that they would also end up paying less tax on the money than they would normally be required to pay. The agreement-in-principle referred to was outlined in a March 29, 2000, news release advising that the key provisions include:

- The Province of B.C. paying the provincial share of the income taxes owing on the income support received by program clients.

- The Province of B.C. paying the federal government an amount equivalent to the interest charged by the Canada Customs and Revenue Agency on the balance of the tax debt for 24 months.

As is clear from the preceding sections of this report, FRBC did not provide the best advice that it could have based on the information that was available. As well, after considering the outcome of the actions taken, FRBC did not ensure that participants received the most benefit from the program. Rather, the actions resulted, over time, in increasing tax liabilities for participants, who for several years were not even aware of the tax liability. As well, given the timing of FRBC's eventual notice of the pending tax liability to participants, which was just prior to Christmas 1999, it is reasonable to conclude that it would have been stressful and emotional to find out that a tax bill spanning possibly several years was on its way and to not know how much the bill would be.

With respect to the agreement between the province and the federal government, although it certainly provides some assistance to participants, we do not believe that it adequately addresses the impact of the unfairness identified in this report. We do not agree with the comment that everybody is better off because of his or her participation in the program. There are people, particularly those in the low-income bracket, who could easily be in a worse situation than they were prior to participating in the program because they do not have savings to cover the unexpected federal tax bill and/or may not yet be employed. FRBC acknowledged itself that a significant number of people would not have put funds aside to cover taxes. In our opinion, the negative financial impact and other associated consequences of the applicable taxes were foreseeable and would have been largely avoided had FRBC acted reasonably to meet the standard of care that was appropriate in this situation, which would have meant actively pursuing the matter along the way and providing accurate information to participants.

The following is a sampling of comments provided to this Office by program participants which help to demonstrate the impact of FRBC's actions on these individuals and their families:

> *Paying taxes would have been all right if we were told about it so there could have been some planning. I have started my first year in business and cannot afford tax payments...*

> *It involves all aspects of my finances and I can't sleep till it is resolved.*

We were lied to by FRBC and my decision to go to college may definitely have been different if I had known about the tax implications.

I am now in the position of having to live off my RRSP plus pay off the $3558.00 borrowed from friends at Christmas to pay these unexpected taxes.

I do not have the money to pay the tax. Will proceed with personal bankruptcy procedure if reassessment not reversed.

I had to cover costs for gas, ferries, hotel, food while taking these courses, which seemed beyond my means…I was told on a number of occasions that it was deductible, because of this I cashed approx. $5500 in RRSPs. I later discovered only $500 could be claimed as a bursary. This has put me in debt, that of which I have been unable to get out of.

I received the full amount - my wife is a busy mother - we are raising five children (ages 4-14)… The BC Government (FRBC) issued T5007s for this income, instructing me to report it as "[social assistance]" on my income tax return. It was with a sinking feeling of dread that I read subsequent letters from FRBC, which intimated that Revenue Canada was unwilling to accept that this money was "[social assistance]", in fact they had decided that both the training and income support are taxable. I filed my return as advised by FRBC, i.e. with information slips provided by them, detailing the income support as social assistance payments. It was processed and I received a tax refund. I heaved a sigh of relief at that time,

thinking that the feds and province had worked it out. Alas, the feeling of fiscal dread returned shortly after! In May of this year a Notice of Reassessment arrived, much to my dismay…So here I am, facing what is to me a gigantic tax bill, and wondering what to do…

FRBC told me monies were non-taxable even though they knew at the time this was untrue. I have been assessed over $1800 for 1998 and will be assessed for 1999. I am on social assistance and have no way of paying Revenue Canada. The interest will be mounting. I am afraid of losing my home for back taxes.

I relocated to find work after finishing my college courses and during the period I was receiving this money, I could pay for my daughters' child support…having to pay taxes on this money I now can't afford to go see them. I would have taken different action if I knew I had to pay any taxes on this money.

I was fortunate to get a job in Northern Alberta. Although this was not my preferred choice of locations or wages, I am starting over and grateful. It was at considerable expense that I moved to Northern Alberta. My savings and assets are at an all time low, having to liquidate property and material goods to survive and support the transition to a new community. I am now working at a less than average paying job thinking maybe, just maybe, I will start to catch up if I am diligent and conservative. Unfortunately, my conservative approach does not seem to be working, and I cannot endure the latest tax burden levied upon me.

On December 24/99 I received a "Notice of Reassessment" that said, "all payments from FRBC are taxable" and that I owed $5,158.10. ($658.80 in interest!). I was completely shocked and dismayed. To be informed (on Christmas Eve!) that I owed this huge amount of money was devastating. I cannot comprehend how I could be then taxed another $653.80 on an amount that I had no idea I was owing. At this point I am unable to pay this amount, even if I thought I should. I am currently unemployed and struggling to make ends meet from month to month. The interest is adding up faster (approx. $70./ month) than I could possibly keep up with…if we had been told it was taxable, or even probably taxable, we could have made choices about whether to continue, or whether to put away a percentage, etc. Our argument was that $400. per wk. minus taxes would be less than Unemployment Benefits… [FRBC] assured us that the BC Government had an agreement with the Federal Government and this money was in fact tax free because it was being looked at as social assistance… I would like the $11,000 tax bill from Revenue Canada paid out by FRBC, the provincial government or forgiven by Revenue Canada. The matter is urgent because I cannot afford the payments to Revenue Canada and I don't feel that I should have to give up my home because somebody lied to me 4 yrs ago.

My wife was part of the forestry renewal program 1997 & 1998. She was told that retraining assistance was not taxable. We proceeded accordingly – not bothering to keep aside tax revenue. We file joint returns. My wife received reassessment and was ordered to pay tax on this past 'non' taxable assistance. Of course this has compounded my return and I have now received a reassessment of $1500.00 owing because of this mix-up. This reassessment puts a

great financial strain on not only me but my wife and our business. ...the government wants payment now with interest and I have been off work for the winter and unable to pay anything until returning to work...

Because I wanted to continue my education, and because I thought I was in a low-income year, I cashed in some RRSPs. Now I am going to be taxed on this money. If FRBC had been honest, I would have made my own decisions...I made decisions both personal and financial that will cost me more than this program has ever paid me.

FRBC recipients' children have learned first hand that a Crown Corporation lied to their mothers and fathers and ruined Christmas 1999 by allowing reassessments to be sent out. FRBC turned its back on the very people the program was designed to help. At present FRBC may be willing to pay the provincial portion of the taxes owing and still stick the recipients with the federal portion of the taxes. The taxes I was told I would never pay!

If I had not been misinformed by FRBC (NDP) I would have filed my taxes as normal and would not have this outstanding bill to pay as well as the interest of which I should never have been billed in the first place!

Initially, I was told support was tax- free. As a result I made a decision to return to school instead of teaching overseas...I made a major life decision based on erroneous (false) information...I have changed career mid-life and am stuck with a huge unexpected tax bill just when I am trying to get my life back together.

This whole matter fell apart as soon as the first bill from Revenue Canada came…I wouldn't have went to school if we were informed. My $7700.00 tax bill puts a large strain on my already small pay cheque. One could say my stress level has gone up a tad. Resolving this matter would surely help…the longer it lingers the more interest builds on my account…"

As a single mother, I would have been better off on welfare. Now I am concerned about my credit rating.

I based my decision to go back to school on the fact that the funding would be tax-free. Had I known the income would be taxable, it would not have been worth it to go back to school. It was barely feasible as it was. I do not have the funds to pay them. I have a wife and child. I also have a new business that is struggling. If Revenue Canada cleans out my bank account just once, I will be forced into bankruptcy.

The examples and comments provided above do not include all the possible scenarios that have resulted in participants either ending up in worse financial situations as a result of the information provided or in situations where they are simply unable to pay the remaining unexpected tax liability. Nor do they give any indication of the actual number of participants that are in these situations. The purpose of providing these examples is to make the point that some people have ended up in difficult financial situations. From the information reviewed in this investigation, the total number of people who have been affected and who they are is difficult to determine. It does appear to be clear, however, that FRBC has an obligation to people who have ended up in a worse financial situation

because of the information provided by FRBC. It is the opinion of this Office that FRBC is required to do more to remedy the issues of unfairness identified in this report.

1. Recommendations

In contemplating a possible resolution for participants who have been aggrieved, we considered making a recommendation that FRBC now develop a fair and appropriate means, needs or income test to provide financial assistance to those participants who are currently experiencing financial difficulty in paying the federal tax bill. Although this type of recommendation is supportable and has the benefit to FRBC of managing the financial cost, such a recommendation has the potential of being viewed as penalizing those participants who have already paid their taxes and who may have experienced great difficulty in doing so. As such, we are not making a recommendation of this nature.

We also considered making a recommendation that FRBC assist only those people who were misinformed, recognizing that some participants accepted into the later stages of the program were specifically advised that income and training supports were subject to tax. However, as FRBC went on to reach an agreement with the federal government to cover the provincial taxes and associated interest for all program participants, it would be problematic to now make a recommendation that FRBC assist only some of the participants. As well, this would be inconsistent with what would appear to be FRBC's intent to ensure that tax relief be applied equally to all participants.

In considering possible resolutions, we took into account FRBC's statement that it wanted to ensure that participants received the maximum benefit from the program. We have also taken into consideration FRBC's efforts to achieve its goal of making income support payments to unemployed participants non-taxable. We also noted that one of the options considered earlier by FRBC was to pay the federal and provincial taxes on behalf of the program participants. As such, we have decided that it would be appropriate to make recommendations that complement these efforts. Therefore, we make the following recommendations:

Recommendation 1:

That FRBC issue a public apology: for making the initial assumption that both income and training supports were not taxable and acting on this assumption without confirmation from Revenue Canada; for the February 25, 1998, decision to act contrary to Revenue Canada's instructions; for unnecessarily delaying the issuance of appropriate T4A slips for the reporting of income support payments; and for the manner in which it acted and presented its position, which led people to assume that taxes would not apply.

Recommendation 2:

That FRBC cover all taxes, both provincial and federal, levied against participants, including all interest charges.

Recommendation 3:

That FRBC take steps to work with the federal government and other provincial agencies to ensure that any financial assistance provided is paid directly by the province to the federal government and that this assistance itself is not taxed. That FRBC work with appropriate provincial agencies to ensure that any refund of taxes is not seen as income to be deducted from income assistance or employment insurance payments. Alternatively, that FRBC work with the appropriate agencies to reach an equally beneficial outcome for participants, such as, for example, future tax credits of equivalent value.

2. Forest Renewal BC's Response

On May 24, 2001, we informed FRBC of the preliminary results of our investigation and of our tentative recommendations. This was done pursuant to s.17 of the *Ombudsman Act*, which reads as follows:

> 17 If it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman must, before deciding the matter,
>
> (a) inform the authority or person of the grounds, and
>
> (b) give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman.
>
> R.S.B.C. 1996

Following a review of FRBC's initial written response, meetings were held with FRBC representatives to allow further representations. In the interim, the CEO and the Board of Directors were replaced. Agreement was subsequently reached on the report conclusions. In a letter dated September 11, 2001, Don Wright, Chief Executive Officer, FRBC, acknowledged, "there were many problems associated with the administration of the Forest Worker Transition Program and we support the substantive findings of the Ombudsman's report. We further acknowledge that many participants of this program ended up in difficult financial situations as a result of information provided to them by Forest Renewal BC."

FRBC has also confirmed its agreement with the three recommendations contained in this report and confirmed its commitment to implement these recommendations. We understand that Recommendations 1 and 3 are being referred to Cabinet for consideration and response. We have been advised Treasury Board is recommending to Cabinet implementation of Recommendation 2. It is our intention to publicly report on Cabinet's response.

Howard Kushner
Ombudsman for the Province of British Columbia